

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 114
5295938

BETWEEN

ELENI DIAKAKI
Applicant

AND

GREEK ORTHODOX
COMMUNITY OF
WELLINGTON INC
Respondent

Member of Authority: P R Stapp

Representatives: Paul Cheng and Lois Gilmor Counsel for Applicant
Tim Cleary Counsel for Respondent

Investigation Meeting: 8 March 2011 at Wellington

Determination: 20 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem is about a number of allegations made by the applicant in regard to her employment with the Greek Orthodox Community of Wellington Inc (the GOCW or the respondent). Her allegations are that she was underpaid for hours she alleges had been agreed for her to work; that she was not paid fortnightly on time as required under her employment agreement; that she was not paid for translations, that she was not paid for expenses, that GOCW failed to act in good faith under the Employment Relations Act, and that GOCW misled and deceived her about the hours she would be working and to enjoy a lifestyle in New Zealand. In addition she claimed that there had been a breach of good faith that she was harassed, that there were private investigators arranged to follow her and that rumours were initiated about her. Also she has claimed sick pay and holiday pay.

[2] The GOCW has denied all the allegations. It claimed Ms Diakaki was only offered 20 hours per week (which included an arrangement to clean for 10 hours extra). It has been contended that she was paid correctly. Subsequently her hours were reduced by agreement. The GOCW claimed that Ms Diakaki was paid in accordance with her employment agreement. It accepted that she was not paid fortnightly under the employment agreement, but says that Mrs Diakaki was paid monthly which she agreed to because she never complained. Mrs Diakaki did not complain, I hold. GOCW accepted that there was a delay in the payment of wages once because Mrs Diakaki was on holiday in Greece without having provided contact details. This was supported by the evidence. The GOCW denied any misleading and deceptive conduct. It denied breaching the requirement to act in good faith

Issues

[3] There are a number of issues:

- a. Was Mrs Bares acting personally and or as the President of the Greek Orthodox Community of Wellington Inc in her involvement with Mrs Diakaki before 21 March 2007?
- b. Was there a job interview before 21 March 2007?
- c. What were the hours of work agreed to by the parties?
- d. Was Mrs Diakaki paid correctly on time under the employment agreement?
- e. What arrangements were in place for any payment of any translations and expenses?
- f. Credibility issues relate to the timing of the offer of work, the hours of work, Mrs Bares' involvement with Mrs Diakaki, the help with New Zealand Immigration, the payment for translation and the payment for preparation and school costs/expenses. Whether or not the facts support (1) an arrears of wages claim in regard to hours of work; (2)

breaches for any failure to be paid fortnightly under the employment agreement, (3) any breaches of good faith and (4) any misleading and deceptive behaviour.

- g. Is Mrs Diakaki owed any sick leave and holiday pay?
- h. What other remedies apply?

The facts

[4] Mrs Diakaki lived in Greece. She initiated contact with Stella Bares President of the Greek Orthodox Community Inc to live in New Zealand. The GOCW is a registered charitable organisation. Mrs Bares and Mrs Diakaki communicated with each other by email and telephone contact at first. Next Mrs Bares visited Greece and contacted Mrs Diakaki in person while she was there. They discussed employment in New Zealand.

[5] A teaching vacancy came about at the GOCW School in Wellington. Mrs Bares contacted Mrs Diakaki again and they had discussions about employment with GOCW in New Zealand because Mrs Bares' knew Diakaki and her interest. Also, they both started discussions with the authorities on Mrs Diakaki and her family moving to New Zealand to work. This involved issues on the hours envisaged for Mrs Diakaki to work and what she would be doing. Mrs Diakaki applied to New Zealand Immigration. It also involved Mrs Bares getting support from a Member of Parliament (16 March 2007).

[6] An offer to work was made to Mrs Diakaki on 7 May 2007 by the GOCW. Mrs Diakaki was provided with an employment agreement to consider and sign. Mrs Bares completed an employer supplementary form for a work permit/viza application with the New Zealand Immigration Service. The details of the hours of work were 20 hours per week on a three year contract. On 8 May 2007 Mrs Diakaki accepted the offer of employment subject to the necessary permit being granted.

[7] Under the employment agreement the duties for work included:

2.2 Duties

- 1 *To teach modern Greek to children from playgroup to age 12 and conversation Greek to adults.*
- 2 *To translate documents from English to Greek and Greek to English when required by the Greek Orthodox Community of Wellington.*
- 3 *To perform other Greek Cultural duties when required.*

[8] The employment agreement stated that the hours of work would be:

- 1 *Fixed hours 2 hours on Monday, Tuesday, Thursday, and Friday 4-pm to 6-pm. 2 Hours on Monday 7-00pm to 9-00pm.*
- 2 *Flexible hours. Such other hours up to 10 hours per week Monday to Friday as may be required by the Employer to complete the duties under 2.2 Duties specified above.*

[9] The work visa was granted on 5 June 2007, but only after New Zealand Immigration had been satisfied that the hours of work would be sufficient to enable Mrs Diakaki and her family to live in New Zealand. Mrs Diakaki commenced work in New Zealand on or about 1 July 2007. Both parties are now in dispute over what hours were agreed and whether or not their agreement met the requirements of New Zealand Immigration for full time employment. Despite the terms in the agreement the arrangement was made for Mrs Diakaki's husband to work cleaning for 10 hours a week. Mrs Diakaki says she received an undertaking that her hours would increase to 30 hours a week and subsequently to 36 hours a week. This would involve preparation for teaching, translations and cultural duties when required. GOCW denied this claim.

[10] Some time after starting Mrs Diakaki's hours increased to 12 for teaching when a new class was started. She agreed to the change.

[11] Difficulties started to appear in Mrs Diakaki's life during her employment, for example she separated from her husband in March 2008. Aspects of Mrs Diakaki's personal life and relationship with Mrs Bares became intermingled with her work responsibilities. In this period there was an agreement reached for Mrs Diakaki to

work less hours. Mrs Diakaki then resigned her employment on 25 September 2008. Her statement of problem was filed on 16 February 2010.

[12] The parties attended mediation and it now falls on the Authority to make a determination.

Determination

[13] I hold that Mrs Bares was acting personally and not as the President of the Greek Orthodox Community of Wellington Inc in her involvement with Mrs Diakaki before 21 March 2007, and including the time she visited Greece and met Mrs Diakaki. It is possible that with Mrs Diakaki's desire to migrate to New Zealand that she has interpreted the meeting she had with Mrs Bares in a way that was more than it actually was. Mrs Bares had no authority to represent the GOCW in her relationship at that time. Unfortunately for Mrs Bares the help and assistance she gave to Mrs Diakaki has become blurred between her official role and what she was doing personally. Her approach to a Member of Parliament and involvement with New Zealand Immigration service before being authorised to act by the GOCW has not helped because of the way in which Mrs Diakaki has now interpreted Mrs Bares' actions. It is understandable how Mrs Diakaki has interpreted Mrs Bares' role now. The thrust of Mrs Diakaki's evidence has been to claim that she was misled to come to New Zealand on the basis of promises that were not fulfilled. I do not accept that claim. The reason is that Mrs Bares had nothing to gain, I hold, whereas Mrs Diakaki has a lot to gain by her claims. On balance I accept Mrs Bares' account as well intentioned actions to help Mrs Diakaki. GOCW's action to provide hours for Mrs Diakaki's husband is not proof of any deliberate and wilful action I hold. Mrs Bares was open on what the employment agreement said and that Mrs Diakaki's husband's arrangements were entered into by agreement, and I accept that Mrs Bares' answers were genuine and reliable.

[14] Further, Mrs Diakaki did not call any corroborating evidence from any one about what New Zealand Immigration actually told her that Mrs Bares had told it and to confirm it was "*really much the same*" as she was saying happened. There was nothing definitive about the evidence because until the employment agreement had

been signed off there could have only been discussions taking place on what might have possible and to meet New Zealand Immigration requirements.

[15] I hold that there could not have been a job interview as such before 21 March 2007. There was no position available at the time they first met and Mrs Bares had no authority from the GOCW to offer work, let alone offer any terms and conditions. It was more than likely that Mrs Bares was acting in a personal capacity to set out to help Mrs Diakaki, a person that she liked and had formed a personal friendship with. This caused her to follow up with Mrs Diakaki the vacancy when it arose. It was only later that a vacancy occurred and that the committee gave its authority for Mrs Bares to fill it and approach Mrs Diakaki.

[16] My conclusion is supported by the offer of the employment agreement that came later. Terms and conditions were contained in that document. The agreement was accepted by Mrs Diakaki on 8 May. Other oral and informal arrangements on the basis of a promise of 30-36 hours are not likely to have existed, I hold. This is because:

- a. There was a signed employment agreement;
- b. There is a dispute over what information was given to New Zealand Immigration about what constituted full time requirements to work in New Zealand;
- c. The first claim for extra hours was made in April 2010 by Mrs Diakaki;
- d. The particularised claim from Mrs Diakaki for translation costs and reimbursement expenses was made when the statement of problem was filed on 16 February 2010 and amended statement of problem 22 April 2010;
- e. No receipts for expenses or any other supporting record have been provided to establish that such expenses were incurred and claimed, except for Mrs Diakaki making an approximation of the sum which she

referred to in her evidence. This is not good enough to support the claim, I hold;

- f. There was no agreed procedure for making any such claims.
- g. Mrs Diakaki raised and agreed to work fewer hours later because of her personal circumstances.
- h. Mrs Diakaki agreed the contract guaranteed 10 hours plus up to 10 hours more and then she agreed to let her husband share the work on offer. I accept this arrangement came about mutually during the employment relationship despite not meeting the terms of the agreement and or any written variation of terms. I accept the GOCW only had a certain number of hours available for work.
- i. In addition in light of some communication with New Zealand Immigration at the time GOCW confirmed that up to 20 hours were guaranteed. Again this was supported by the employment agreement and employer supplementary form.
- j. Further Mrs Diakaki changed her position when giving evidence to limit her claim only to 30 hours during the Authority's investigation.

[17] Mrs Diakaki has not satisfied me that 30-36 hours was offered for any agreement given the dispute between her and GOCW on the amount of hours required to constitute a full time position to ensure the family was able to make a living in New Zealand and the signed employment agreement.

[18] Without any written terms on the payment for teaching preparation I hold that it was unlikely that there was any agreement that these would be paid in addition to the hours in the employment agreement. This is especially so when there has been no disagreement by the parties on the extra 2 hours that were provided to make up the hours to twelve because of a new class starting.

[19] The claim for pay for extra hours is dismissed.

[20] Mrs Diakaki was paid for her teaching work and included being paid for cultural duties on three Sundays for which she was also paid (not challenged). Furthermore the absence of any receipts and details on the payment of expenses and an absence of any agreed procedure make sit unlikely any expenses are due.

[21] Mrs Diakaki's employment agreement makes provision for translations and being paid so long as it related to GOCW. It is understandable why Mrs Diakaki believes that she should be paid for translations as claimed because of the term in the employment agreement and Mrs Bares' role with GOCW as the President. However their personal friendship, Mrs Bares' other roles and the lack of any link between the translations and GOCW do not assist Mrs Diakaki's claim I hold. There has been no detail provided on what her claim actually amounts to for the translations, I hold. I accept the respondent's position that the arrangement in regard to the translations that have been claimed has more to do with Mrs Bares' personal role for another organisation and not connected to the GOCW. Mrs Diakaki made no claims prior to filing her statement of problem in regard to this. Mrs Diakaki and Mrs Bares did have a personal friendship. Mrs Diakaki never made any claim through GOCW before the statement of employment relationship problem was lodged and after her employment she had issues arising from not being accepted as a member of GOCW. GOCW's defence was supported by the explanation from Mrs Bares about the organisation she was involved with for this work. It is more than likely therefore the two minor translations in issue were done for Mrs Bares voluntarily, I hold. The claim for payment of the translation is dismissed.

[22] The claim that the GOCW has not paid Mrs Diakaki fortnightly under the terms of the employment agreement has been explained by GOCW that it paid monthly as it did for other teachers at GOCW. It has breached the employment agreement by not paying the wages fortnightly. Mrs Diakaki never formally complained during her employment about the new arrangement. I accept that Mrs Diakaki accepted the practice over time. This is not a matter for a penalty for a breach of the employment agreement because Mrs Diakaki was not deprived of the use her pay. Also the claim for a penalty in regard to the cause of action was well outside the twelve months time to recover a penalty (s 135 (5) of the Act). The latest a cause of action occurred to recover a penalty would be Mrs Diakaki's last day on 25

September 2008. Her amended statement of problem was lodged in the Authority on 22 April 2010.

[23] There was a delay in payment on one occasion that has been explained by GOCW that involved Mrs Diakaki going to Greece urgently. She did not leave a forwarding address for her pay cheques to be sent to her while she was away. She was paid. I am not satisfied that there was any deliberate and or malicious action by the GOCW not to properly pay Mrs Diakaki at the time. That cause of action was well outside twelve months to recover a penalty (s 135 (5) of the Act). The claim for penalty for breach of the terms of the employment agreement is dismissed.

[24] There has been no evidence of any misleading and deceptive conduct by GOCW. These claims are well outside the 12 months of the cause of action to recover a penalty. The affairs of the parties are confused, open to misinterpretation and could be construed in different context. However, I hold that GOCW was doing its best to help Mrs Diakaki come to New Zealand and to do so within the rules and requirements having regard to the availability of limited hours for work. I hold the GOCW genuinely offered Mrs Diakaki work that was available and it tried to assist her in her personal circumstances. In doing so what was put in writing did not work out in practice, albeit expressed and actioned differently later. For instance the cleaning hours given to Mrs Diakaki's husband. GOCW has at least been consistent over the available hours of work throughout. For example the hours provided under the employment agreement and in correspondence.

[25] I conclude that in all the circumstances Mrs Diakaki has not been able to establish her claim for a breach of good faith. Furthermore I am satisfied that other complaints made by Mrs Diakaki relate to her personal friendship with Mrs Bares, and could not be levelled against GOCW as the employer at the time.

[26] There is evidence that Mrs Diakaki was not correctly paid for holidays and sick leave. There was a shortfall in holiday payments. This amounted to \$247.86. There is a sick leave payment of \$205.40. These have been paid by cheque, which has not been cashed by Mrs Diakaki. No other calculations and no details were provided to support her claims. However there is an outstanding issue about pay for the period December 2007 until February 2008 that Mrs Diakaki claims she was not

paid during the school break. The basis of the claim has not been provided. The true record using the wage and time record produced indicates that holiday payments were made at the time. No other calculations for the claim were put forward. I have decided to reserve any issue on arrears of wages because the wage and time records were produced during the Authority's investigation meeting and the parties' representatives have not made submissions on. This matter is very much an ancillary matter and requires proper argument based on proper calculations. The summary of the applicant's earnings and claim for 30 hours has not assisted me in determining any calculation on this part of her claim relating to be paid for the period December 2007 to February 2008 if she is owed anything bearing in mind holiday payments and the employment agreement.

Orders of the Authority on all claims

[27] Mrs Diakaki's claims are dismissed. It is not appropriate therefore to make any remedies as claimed.

[28] The arrears claim on any holiday pay period is reserved. However, I confirm that GOCW owes Mrs Diakaki the holiday pay of \$247.86 and sick leave pay of \$205.40 to complete the payment.

[29] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority